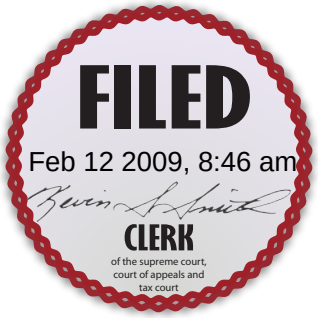

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IN THE
COURT OF APPEALS OF INDIANA

RANDY EVANS,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 48A02-0807-CV-643
	)	
MYERS AUTOWORLD, INC.,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Jack L. Brinkman, Judge
Cause No. 48D02-0711-CT-1122

February 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Randy Evans appeals the trial court's order granting summary judgment in favor of Myers Autoworld, Inc. ("Myers"). Evans contends that the trial court erred by granting summary judgment in favor of Myers with regard to his claim for retaliatory discharge. We affirm.

FACTS AND PROCEDURAL HISTORY

Evans was hired by Myers, an automobile dealership located in Anderson, on May 16, 2004, as a body shop technician. At all times relevant to this appeal, Stan Horner was Myers's general manager and Don Fuller was Myers's body shop manager. Evans had worked in the auto body repair business since the 1970s, and had even previously owned his own body repair shop. Auto body repair work involves rigorous physical demands, such as lifting and carrying auto parts or equipment that can weigh up to one hundred pounds, extended periods of bending, stooping, and squatting, and frequent climbing.

On October 6, 2006, Evans injured his back and shoulder while repairing a van at Myers. Evans did not report his injuries or receive treatment for his injuries until October 13, 2006. Evans's injuries persisted, and he was physically unable to continue working after October 20, 2006. Evans filed a workers' compensation claim on November 1, 2006. Myers placed Evans on medical leave during which Evans received medical treatment through the workers' compensation system. At the time Evans began his medical leave, he was placed on a five-pound lifting restriction. His lifting restriction was eventually modified to fifteen pounds. Myers paid for all of Evans's health insurance costs during Evans's medical leave, pursuant to Myers's stated company policy. Myers's Employee Policy and Procedure Manual

provides that an employee may be placed on an extended medical leave, but it does not provide a limitation for how long this extended medical leave may last.

On March 15, 2007, nearly five months after Evans was placed on medical leave, Horner sent Evans a letter which read as follows:

> Dear Randy,
> It's been some time since we've spoken. All things considered, I hope you are doing well. I have been kept informed of your back treatment from Federated Insurance and understand the status of your full work release is still very uncertain. During your leave of absence since early November of last year, as a simple goodwill gesture we have paid and kept current your Group Health Insurance coverage through Anthem. This has been paid through the month of March. I will inform our COBRA administrator of your status and they will promptly send you the information you will need to continue your coverage beyond March 31st should you choose to do so. Do not hesitate to contact me if you have any questions.

Appellant's App. p. 95. Upon receipt of the letter, Evans contacted Horner regarding his employment status at Myers. Horner told Evans that "if there was an opening when [Evans] got better, [they'd] discuss it." Appellant's App. p. 72. At some later time, Fuller requested that Evans return his uniforms and pick up his tools at the body shop. Evans's position at Myers remained open until a replacement was hired on June 7, 2007.

On June 18, 2007, Evans filed suit against Myers, alleging that Myers terminated Evans in retaliation for Evans's pursuing his workers' compensation rights. Evans underwent a Functional Capacity Evaluation ("FCE") on November 8, 2007. The FCE stated that:

> Evans is able to perform work at less than a sedentary physical demand level. He has a low tolerance for standing and is able to stand for 10 to 15 minutes at a time. Sitting tolerance is better as he was able to sit for 55 minutes but was noted to demonstrate increased weight shifting while sitting.

> Mr. Evans demonstrates very low tolerance to physical activity at this time.… Any activities that involve prolonged standing or walking are not recommended at this time. Activities that involve bending or squatting are not recommended at this time.

Appellant's App. pp. 73-74. The FCE further stated that Evans's physical abilities are not currently a match for his desired position as an auto body technician. On February 25, 2008, Evans gave deposition testimony in which he admitted that he could not physically perform the tasks required of an auto body technician and that he would not currently hire himself as an auto body technician.

On April 7, 2008, Myers moved for summary judgment claiming that Evans had been terminated because of his ongoing inability to complete the duties of an auto body technician. The trial court heard argument on Myers's motion on May 19, 2008, and granted Myers's motion on June 18, 2008. This appeal follows.

DISCUSSION AND DECISION

Evans contends that the trial court erred by granting summary judgment in favor of Myers with regard to Evans's claim for retaliatory discharge. Specifically, Evans asserts that summary judgment was improper because the evidence reveals a genuine issue of material fact as to whether Myers's stated reason for his termination was pretextual.

Our standard of review for a trial court's grant or denial of a motion for summary judgment is well-settled. *Purdy v. Wright Tree Serv., Inc.*, 835 N.E.2d 209, 212 (Ind. Ct. App. 2005), *trans. denied*.

> The purpose of summary judgment is to end litigation where no factual dispute exists that may be determined as a matter of law. When reviewing the denial of a motion for summary judgment, we apply the same standard as the trial

> court. Therefore, summary judgment should only be granted when the designated evidentiary material demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Once the moving party meets these two requirements, the burden shifts to the nonmoving party to show the existence of a genuine issue by setting forth specifically designated facts. Any doubts as to any facts or inferences to be drawn therefrom will be resolved in favor of the nonmoving party. The party appealing the denial [or grant] of a motion for summary judgment has the burden of persuading this court on appeal that the trial court's ruling was improper.

Powdertech, Inc. v. Joganic, 776 N.E.2d 1251, 1255-56 (Ind. Ct. App. 2002). A grant of summary judgment may be affirmed upon any theory supported by the designated evidence. *S.E. Johnson Co. v. N. Ind. Pub. Serv. Co.*, 852 N.E.2d 1, 4-5 (Ind. Ct. App. 2006), *trans. denied*.

Generally, in Indiana, if there is no definite or ascertainable term of employment, the employment is at-will, and the employer may discharge the employee at any time with or without cause. *Purdy*, 835 N.E.2d at 212. "However, in *Frampton v. Cent. Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), our Supreme Court created an exception to the employment-at-will doctrine [after] an employee was discharged for filing a worker's compensation claim." *Powdertech*, 776 N.E.2d at 1261. "The *Frampton* court stated that when an employee is discharged solely for exercising a statutorily conferred right, an exception to the general rule is recognized, and a cause of action exists in the employee as a result of the retaliatory discharge." *Id.* (citing *Frampton*, 260 Ind. at 253, 297 N.E.2d at 428).

This court has previously outlined the three steps of a retaliatory discharge claim. *See Purdy*, 835 N.E.2d at 213.

> First, the employee must prove, by a preponderance of the evidence, a prima facie case of discrimination. The burden then shifts to the employer to articulate a legitimate non-discriminatory reason for the discharge. Finally, if the employer carries that burden, the employee can prove, by a preponderance of the evidence, that the reason offered by the employer is a pretext.

Id. (citations omitted).

The question of retaliatory motive for a discharge is generally a question for the trier of fact. *Frampton*, 260 Ind. at 253, 297 N.E.2d at 428.

> Where causation or retaliation is at issue, summary judgment is only appropriate when the evidence is such that no reasonable trier of fact could conclude that a discharge was caused by a prohibited retaliation. To survive a motion for summary judgment in a *Frampton* case, an employee must show more than a filing of a worker's compensation claim and the discharge itself. Accordingly, the employee must present evidence that directly or indirectly implies the necessary inference of causation between the filing of a worker's compensation claim and the termination, such as proximity in time or evidence that the employer's asserted lawful reason for discharge is a pretext.

Powdertech, 776 N.E.2d at 1262 (internal citations and quotations omitted). We note that, as the Seventh Circuit has observed, timing evidence is rarely sufficient in and of itself to create a jury issue on causation. *See Hudson v. Wal-Mart Stores, Inc.*, 412 F.3d 781, 787 (7th Cir. 2005). In cases of wrongful termination based upon allegations of retaliatory discharge, the employee can prove pretext by showing that: (1) the employer's stated reason has no basis in fact; (2) although based on fact, the stated reason was not the actual reason for discharge; or (3) the stated reason was insufficient to warrant the discharge. *Powdertech*, 776 N.E.2d at 1262.

In this case, after Evans alleged that he had been retaliatorily discharged, Myers responded that it had discharged Evans because of his ongoing physical inability to complete the duties associated with his employment as auto body technician. In doing so, Myers established a legitimate, nondiscriminatory reason for Evans's termination: Evans could not complete the tasks required by his position. The burden then shifted to Evans to establish that Myers's reason was pretextual. *See id*. Evans could accomplish this by showing that Myers's proffered reason was "'factually baseless, [was] not the actual motivation for the discharge in question, or [was] insufficient to motivate the discharge.'" *Id*. (quoting *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 289 (7th Cir. 1999)). We conclude that Evans has failed to designate sufficient evidence to create a genuine issue of material fact that Myers's reason for the discharge was pretextual. Given Horner's letter stating that the time frame for Evans's full work release was still very uncertain, which was later corroborated by the FCE and was undisputed by Evans's deposition testimony, and the lack of any designated evidence to the contrary, Evans fails to show that Myers's reason is factually baseless, not the actual motivation for the discharge, or insufficient to motivate the discharge. Evans's only basis for claiming retaliatory discharge is unsubstantiated allegations based upon, inter alia, the Myers's Employee Policy and Procedure Manual. Yet there is no evidence that Evans discharge was a disciplinary action or that the Policy and Procedure Manual is even applicable. The other evidence Evans designates is Horner's letter and the FCE. Yet, even in a light most favorable to Evans, this letter and the FCE merely reinforce that Myers's discharge of Evans was based upon his inability to perform his job. In light of the evidence

designated by the parties, the facts do not permit the inference that Myers's stated reason for discharging Evans was pretextual. Because Myers was able to present a legitimate, nondiscriminatory reason for Evans's termination and because Evans was unable to show that this reason was pretextual, the trial court properly granted Myers's motion for summary judgment in this regard.

Evans also claims that the trial court erred in granting summary judgment in favor of Myers because of the close temporal connection between the date he filed his workers' compensation claim and the date he was terminated. In support of this claim, Evans relies upon *Pepkowski v. Life of Indiana Insurance Co.*, 535 N.E.2d 1164 (1989), and *Markley Enter., Inc. v. Grover*, 716 N.E.2d 559 (Ind. Ct. App. 1999). Evans's reliance on these cases, however, is misplaced. In both *Pepkowski* and *Markley*, while the reviewing courts rejected the companies' claims that a full six months demonstrated a lack of retaliation, in each of these cases there was conflicting evidence regarding causation. In both of these cases, the reviewing courts found that conflicting designated evidence before the trial courts had created issues of fact regarding causation. *Pepkowski*, 535 N.E.2d at 1168; *Markley*, 716 N.E.2d at 565-66.

Here, Evans has failed to point to or designate any conflicting evidence that creates an issue of fact regarding causation. Apart from Evans's unsubstantiated allegations, the undisputed evidence establishes that Evans was terminated approximately five months after he filed his workers' compensation claim because of his physical inability to perform the

tasks required by his position.[1] Therefore, because timing evidence is rarely sufficient in and of itself to create a jury issue on causation and in light of Evans's failure to point to any conflicting evidence, we conclude that Evans has failed to present an issue of fact regarding causation. Thus, the trial court did not err in granting Myers's motion for summary judgment.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and MAY, J., concur.

[1] Evans asserts that his employment was terminated in early November 2006, but the evidence, construed most favorably to Evans, establishes that the earliest possible date on which Evans was terminated was March 16, 2007. (Appellant's App. 95)